

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2559

Cir. Ct. No. 2001CF136

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. BOWERS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. David E. Bowers, *pro se*, appeals from trial court orders denying his WIS. STAT. § 974.06 motions on grounds that they are

procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).¹ We affirm.

BACKGROUND

¶2 Bowers pled guilty to one count of delivering cocaine (less than five grams), contrary to WIS. STAT. § 961.41(1)(cm)1. (2001–02).² The trial court sentenced Bowers to fifteen months of initial confinement and five years and nine months of extended supervision, consecutive to any other sentence.³ Although Bowers filed a notice of intent to pursue postconviction relief, he did not ultimately pursue a direct appeal of his conviction.

¶3 Bowers was released on extended supervision but was later revoked. In January, 2006, the trial court ordered him reconfined for one year, six months, and nine days.⁴ With the assistance of an appointed lawyer, Bowers successfully moved for a new reconfinement hearing. After the second reconfinement hearing, which was held in July, 2007, the trial court vacated the January, 2006 reconfinement order and again ordered Bowers reconfined for one year, six months, and nine days. Because that reconfinement time had already been served, Bowers was released on extended supervision. Bowers did not appeal.

¹ All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

² The postconviction Record in this case is voluminous; it includes filings made in the trial court, the court of appeals, and the supreme court. In this background section we will discuss only the most pertinent filings and orders.

³ The Honorable Richard J. Sankovitz accepted Bowers’s plea and sentenced him. We note that court records indicate that Bowers had other pending cases at the time of sentencing.

⁴ The Honorable William Sosnay presided over the reconfinement hearings in January, 2006, and July, 2007.

¶4 In September, 2007, the Department of Corrections again sought to revoke Bowers's extended supervision based on numerous violations. After a revocation hearing, Bowers's extended supervision was revoked and on October 28, 2008, the trial court conducted a reconfinement hearing and ordered Bowers reconfined for two years, nine months, and fourteen days.⁵ Although Bowers indicated that he wanted to appeal the October 28, 2008 reconfinement order and began the appeals process, he did not ultimately pursue an appeal of that order, even after this court extended the deadline for him to do so.

¶5 On August 17, 2011, Bowers filed a WIS. STAT. § 974.06 motion seeking postconviction relief.⁶ His motion included arguments that the October 28, 2008 reconfinement order violated Bowers's equal protection rights and improperly subjected him to double jeopardy. On August 22, 2011, the trial court issued a written order denying the motion on its merits.

¶6 On August 24, 2011, Bowers filed a motion for reconsideration that reiterated some of his arguments concerning the October 28, 2008 reconfinement order and also asserted that the trial court had erroneously exercised its sentencing discretion. On September 12, 2011, the trial court denied the motion in a written order that addressed the merits of the issues raised in the motion for reconsideration.

⁵ The Honorable Paul Van Grunsven presided over the reconfinement hearing and issued the October 28, 2008 reconfinement order.

⁶ Bowers's motion was assigned to the Honorable Timothy G. Dugan, who also reviewed Bowers's subsequent motions and ultimately issued the two orders at issue in this appeal.

¶7 Bowers appealed. After he failed to file his brief and appendix, this court issued an order extending the deadline for him to file the brief or request an extension. Bowers did not respond. This court issued another order that advised Bowers that if he failed to file his brief, his appeal would be dismissed. Bowers did not respond to the order or file his brief. Accordingly, this court dismissed the appeal. *See State v. Bowers*, No. 2011AP2100, unpublished order (WI App Mar. 16, 2012).

¶8 In January, 2012, before Bowers's appeal was dismissed, he filed another WIS. STAT. § 974.06 motion in the trial court. On May 14, 2012, even though the trial court had taken no action on the motion, Bowers filed a notice of appeal. We subsequently dismissed that appeal for lack of jurisdiction because there was no written order denying the motion. *See State v. Bowers*, No. 2012AP1039, unpublished order (WI App July 13, 2012).

¶9 On May 21, 2012, while the May 2012 appeal was still pending, Bowers filed another WIS. STAT. § 974.06 motion, plus a memorandum in support. He filed additional memoranda of law on July 31, 2012, and October 19, 2012.

¶10 On November 2, 2012, the trial court denied the WIS. STAT. § 974.06 motion on procedural grounds, citing *Escalona-Naranjo*. The trial court explained that Bowers had previously filed two § 974.06 motions in August, 2011, which the trial court denied by written orders entered on August 22, 2011, and September 12, 2011. The trial court added: "Notwithstanding the procedural bar of *Escalona-Naranjo*, the defendant's current motion is denied on its merits for the reasons set forth in the court's prior decisions in this matter."

¶11 On the same day that the trial court denied Bowers's WIS. STAT. § 974.06 motion, Bowers filed another § 974.06 motion. Three days later, he filed

another one. On November 12, 2012, the trial court denied the November 2, 2012 motion and indicated that future motions raising the same issues would result in the assessment of costs against Bowers.⁷

¶12 Bowers subsequently filed a notice of appeal from the two November, 2012 orders and also sought the appointment of a lawyer. We held the appeal in abeyance pending a report from the Office of the State Public Defender, which ultimately declined to appoint a lawyer for Bowers. We issued an order indicating that no lawyer would be appointed and Bowers proceeded with his appeal *pro se*.

LEGAL STANDARDS

¶13 A defendant must raise all grounds for postconviction relief in his or her first postconviction motion. *Escalona–Naranjo*, 185 Wis. 2d at 181, 517 N.W.2d at 162. If a subsequent motion raises grounds for relief that “have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a [WIS. STAT. §] 974.06 motion ... unless the court ascertains that a ‘sufficient reason’ exists for either the failure to allege or to adequately raise the issue” in prior motions. *Escalona–Naranjo*, 185 Wis. 2d at 181–182, 517 N.W.2d at 162 (quoting § 974.06(4); emphasis omitted); *see also State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”).⁸

⁷ The trial court’s order did not specifically comment on the November 5, 2012 motion.

⁸ WISCONSIN STAT. § 974.06(4) provides:

(continued)

Whether a defendant has provided a sufficient reason for failing to raise a claim is a question of law that we review independently. *State v. Kletzien*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 648, 794 N.W.2d 920, 924.

DISCUSSION

¶14 Bowers’s opening brief identifies the issues presented as follows: “The appellate court should vacate the [October 28, 2008] 2 years, 9 months and 14 days reconfinement order on ground[s that] the case ... is at its expiration date and arises [sic] the double jeopardy clause.” (Some capitalization omitted.) Bowers argues that the October 28, 2008 reconfinement order was “an illegal sentence” and that the trial court erred by not giving “judicial reason in the reconfinement hearing.” (Some capitalization omitted.) These appear to be the same issues Bowers raised in his August, 2011 WIS. STAT. § 974.06 motions, which were denied by the trial court on their merits in August, 2011, and September, 2011.

¶15 Bowers’s brief completely ignores the trial court’s ruling concerning his latest WIS. STAT. § 974.06 motions. He does not even acknowledge that the trial court determined that his constitutional claim was procedurally barred, much less develop an argument that the trial court erred. By ignoring the grounds upon

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

which the trial court ruled, Bowers has conceded the validity of the trial court's ruling. See *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994).

¶16 The State agrees with the trial court that Bowers's motions are procedurally barred, adding: "Bowers makes no attempt to avoid the procedural bar." In his reply brief, Bowers does not address the State's arguments that his motions are procedurally barred. Arguments not rebutted are deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

¶17 We affirm the trial court's orders. Bowers's motions are procedurally barred because they raise issues that were litigated in his previous WIS. STAT. § 974.06 motions and, to the extent new issues are raised, Bowers has not offered a sufficient reason for failing to raise those issues before. See § 974.06(4); *Escalona-Naranjo*, 185 Wis. 2d at 181–182, 517 N.W.2d at 162; *Witkowski*, 163 Wis. 2d at 990, 473 N.W.2d at 514.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

